a sum of $50 expressed to be by way of liquidated damages to be deducted from his deposit. By reason of section 75 of the Contract Ordinance that is, of course, a penalty clause. But by paragraph (c) when insufficient labourers have been employed for a period of fourteen days then that is to be deemed to be a breach of the provisions of the Agreement such as would invoke the application of Clause 12(b). And it is Clause 12(b) that provides that upon the breach of the Agreement the Agreement shall be determined and the deposit forfeited. It may well be that that is to be construed as a penalty clause but as I have pointed out that is beside the point for in these proceedings the defendant is not trying to enforce the penalty.

The truth is that the plaintiff has brought himself fairly and squarely within Clauses 2(c) and 12(b). The defendant has done what by the terms of the contract he is perfectly entitled to do, that is to say he has kept the deposit and, to my mind, that is the end of the matter. In that connection I would quote the words of Bigham J., in the case of *Pye v. The British Automobile Commerical Syndicate Limited*[6]. In that case the plaintiff was suing for the return of a deposit made in connection with an agency contract for the sale of motor cars. His Lordship discussed the case of *Wallis v. Smith, supra,* with which he was clearly not in entire agreement but went on to observe :—

"The plaintiff here has himself already paid this sum to the defendants. He has parted with the money, and that circumstance is significant to show that he did not intend to have it back if he committed a breach of the agreement."

There will accordingly be judgment for the defendant on the claim and the counter-claim will be dismissed with costs.

With regard to the costs I would point out that for the purposes of taxation the claim should be treated as if it stood alone and the counter-claim should bear only the amount by which the costs of the proceedings have been increased by it. (See *White Book,* 1956, page 1409). In my opinion, the costs of the trial have not been in any way increased by the counter-claim. The questions of law and fact involved would have had to be investigated and tried out just as fully as they were had there been no counter-claim.

*Claim dismissed.*

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## I. B. DRENNAN v. R. F. GREER

[C. A. (Thomson C.J., Abdul Hamid and Neal JJ.) December 4, 1956]

[K. L. — F.M. Civil Appeal No. 40 of 1956]

*Negligence — Damages for personal injuries caused by negligence — Duty of care — Volenti non fit injuria — Contributory negligence — Quantum of damages.*

In this case the plaintiff was a passenger in a car driven by the defendant from Port Swettenham to Klang. It appeared that the car was driven at high speed and that the plaintiff warned the defendant to slow down and to be careful as he thought that the defendant was going too fast for the safety of the public on the road. The car collided with a cyclist, the defendant lost control of his car and the accident took place as a result of which the plaintiff sustained the injuries. The plaintiff sued for damages. At the trial liability was denied and it was pleaded (a) that in the circumstances the defendant owed no duty of care to the plaintiff; (b) the maxim *volenti non fit injuria* applied; and (c) that the plaintiff was guilty of contributary negligence. The learned trial Judge held (a) that the defendant owed a duty of care to the plaintiff; (b) that on the facts the defence of *volenti non fit injuria* did not apply; (c) that the plaintiff was not guilty of contributory negligence: and he awarded damages, including an assessment of general damages at $35,000 to the plaintiff. An appeal was filed against the assessment of general damages.

**Held:** there was no ground for interfering with the finding of the trial Judge as to the assessment of damages and therefor the appeal must be dismissed.

So far as concern such questions as pain and suffering, any assessment of damages must contain a very subjective element. A very large part in the assessment must be played by the personal opinion of the trial Judge.

*Cases referred to :—*

(1) *Thomas v. Quartermaine* (1887) 18 Q.B.D. 685.
(2) *Daly v. Liverpool Corporation* (1939) 2 All E.R. 142.
(3) *Insurance Commissioners v. Joyce* (1948) 2 Argus L.R. 356.
(4) *London Graving Dock Co. Ltd. v. Horton* (1951) 2 All E.R. 1.
(5) *Dann v. Hamilton* (1939) 1 K.B. 509.
(6) *Slater v. Clay Cross Co. Ltd.* (1956) 2 Q.B. 264.
(7) *Nance v. British Columbia Electric Railway* (1951) A.C. 601.
(8) *Caswell v. Powell Duffryn Collieries* (1940) A.C. 152.
(9) *Shearman v. Folland* (1950) 2 K.B. 43.
(10) *British Transport Commission v. Gourley* (1956) 2 W.L.R. 41; (1956) A.C. 185.
(11) *Billingham v. Hughes* (1949) 1 K.B. 643.
(12) *Bird v. Cocking & Sons Ltd.* (1951) 2 T.L.R.
(13) *Flint v. Lovell* (1935) 1 K.B. 354.
(14) *Davies v. Powell Duffryn Associated Collieries Ltd.* (1942) A.C. 601, 616.
(15) *Rushton v. National Coal Board* (1953) 1 All E.R. 314.

In the Court below the following judgment was delivered :—

**Buhagiar J.** : — This is a claim for damages in respect of personal injuries sustained by the plaintiff in a car accident. The facts are as follows :—

On the 4th September, 1955, the plaintiff who was then a representative of the Manufacturers' Life Assurance Company, went to see the defendant at North Mummock Estate, Klang, about insurance matters; he went there in his own car; they arrived at

the Estate about 12.30. The plaintiff was accompanied by Capt. Billett. After having discussed insurance business the plaintiff and Capt. Billett proceeded to Port Swettenham to see a friend off; they went in the defendant's car, a new Jaguar; the defendant was driving. All three went on board the ship which sailed about 3.30 p.m. After leaving the ship they went to the Seaview Hotel, about three quarters of a mile from the docks; by this time they were joined by a Miss Setter; there they had some refreshments. At about 4.15 p.m. the party of four left in the defendant's car towards the Estate. The defendant was driving, the plaintiff was occupying the seat next to the driver and the other two passengers were at the back. Along the Port Swettenham — Klang Road, the defendant starting picking up speed and for about two miles he was driving at from 90 to 100 m.p.h. The stretch from Port Swettenham to Klang is straight and the road is good. On either side there are houses away from the road but some have gardens abutting on the road. There was not much traffic on the road; the defendant had good control of the car; but the plaintiff told the defendant to slow down and to be careful. The defendant did in fact slow down on approaching Klang; he drove through Klang slowly, about 20 to 25 m.p.h. At about a quarter of a mile after leaving Klang, however, the defendant started picking up speed and was in fact travelling at about 50 m.p.h. on Meru Road in a 30 mile limit area. On approaching a corner the plaintiff again told the defendant to slow down and to be careful as he thought that the defendant was going too fast for the safety of the public on the road. This warning, however, came too late as a cyclist appeared on the road, the defendant lost control of the car and the accident took place as a result of which the plaintiff sustained the injuries.

It may be added that from the time the plaintiff met the defendant at his Estate until the partaking of refreshments at the Seaview Hotel the plaintiff had had three or four glasses of beer, but there is no suggestion that either he or the defendant was drunk. Up to the time of the accident the defendant had control of the car and the plaintiff knew the defendant to be a good driver.

The particulars of negligence are given in paragraph 2 of the statement of claim and it is admitted by the defendant that the plaintiff suffered injuries and damage through an accident which was caused by the careless driving of the defendant. Liability is, however, denied and the defence pleaded consists in,

(1) a denial of negligence in that in the circumstances the defendant owed no duty to the plaintiff;
(2) the application of the maxim *volenti non fit injuria;* and
(3) contributory negligence on the part of the plaintiff.

These three defences are not mutually exclusive and the same evidence may establish a defence under each heading.

With regard to the first heading it is a well established principle of law that there is no liability for negligence unless there is in the particular case a legal duty to take care and this duty must be one which is owed to the plaintiff himself and not merely to others. As Bowen L.J. said in *Thomas v. Quartermaine*[1] at p. 694 :—

> The ideas of negligence and duty are strictly correlative and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound to exercise towards somebody."

Now care is a matter of degree and it is necessary to determine what degree or amount of care is obligatory in the particular circumstances of each case. Before it can be exactly defined the precise nature of the duty of care requires consideration and one main consideration is the relationship between the plaintiff and the defendant; thus the duty of each of an occupier of land offers according to whether the duty is owed to an invitee, a licencee or trespasser as pointed out in *Salmond* on Torts, 11th ed. at p. 495,

> "A man may be under a duty of care towards one person, and yet in the same matter and on the same occasion under no duty of care towards another . . . ."

What is the duty of care owed by the driver of a motor-vehicle? It is not possible to lay down any formula of general application regarding the standard of duty or of care for such standard is different according to the class of persons to whom a duty is owed. In *Daly v. Liverpool Corporation*[2], which was a case of injuries caused by the driver of a public vehicle to a pedestrian, a lady advanced in years, Stable J. held that

> "The standard of care and skill which the law must demand from the driver of a motor-car to-day is a very high one indeed. A motor-car has become a lethal weapon."

But as pointed out by Dixon J. in *Insurance Commissioners v. Joyce*[3], at p. 365,

> "The case of a passenger in a car differs from that of a pedestrian, not in the kind or degree of danger which may come from any want of care or skill in driving, but in the fact that the former has come into a more particular relation with the driver of the car. It is because that relation may vary that the standard of duty or of care is not necessarily the same in every case."

Dixon J. put the matter very clearly when he went on to say :—

> "At one extreme is the trespasser and at the other the passenger who has made an express contract containing terms regulating his rights in case of injury. But *prima facie* a gratuitous passenger is entitled to the ordinary care for his safety which may reasonably be expected in the management of the kind of conveyance in which he accepts a place. A man who obtains permission to ride upon a timber jinker is not entitled to any more care on his behalf than is included in the proper management of such a vehicle. But in a car intended as a conveyance, the gratuitous passenger may expect *prima facie* the same care and skill on the part of the driver as is ordinarily demanded in the management of a car. Unusual conditions may exist which are apparent to him or of which he may be informed, and they may affect the application of the standard of care that is due. If a man accepts a lift from a car driver whom he knows to have lost a limb or an eye or to be deaf, he cannot complain if he does not exhibit the skill and competence

of a driver who suffers from no defect. It is, perhaps, not often of much practical importance whether the passenger is regarded as voluntarily assuming the risks which are involved and so absolving the car driver from a standard of duty to which otherwise he would be subject, or the passenger is considered primarily to be entitled only to that standard of duty or of care which arises from the relation that he has established, namely, a passenger in a car driven by a defective driver."

Generally it may be said that the duty of a driver of a motor-car is to exercise the ordinary care which is expected of one responsible for the proper management and control of a moving vehicle because the safety of the occupants of the vehicle, as well as of others depends upon his skill and care. Can it be said in this case that the relationship created between the plaintiff and the defendant was such that the plaintiff could not expect any care on the part of the defendant? I do not think that it was. The defendant was known to the plaintiff to be a good driver; the car was not in any way defective. It is true that the car was being driven at a high speed on the Port Swettenham — Klang Road but, as the plaintiff stated, the defendant had good control of the car and, in my opinion, that fact that a car, a Jaguar, was being driven at that speed on a long, straight stretch of the road does not necessarily imply lack of care or skill; driving at such high speed may be a danger to pedestrians but not necessarily to passengers in the car. It is also true that after leaving Klang town the defendant started picking up speed on the Meru Road, a road within a thirty mile limit area, which is not as wide as the Port Swettenham — Klang Road and which has, at least at the spot where the accident occurred, a bend. Admittedly this indicates lack of care, indeed it was such lack of care which was the cause of the accident. But the plaintiff warned the defendant to be careful as soon as he considered that the defendant was driving at an excessive and, in view of the conditions of the road, a dangerous speed. The accident happened immediately after such warning and it cannot be said under the circumstances that the plaintiff was entitled to expect only that care which is expected of a careless driver. It cannot be said that the circumstances involved a dispensation from all standards of care. The plaintiff could not reasonably have been expected to tell the defendant; "You are driving at a dangerous speed and I am not prepared to take the risk of any accident as a result of your careless driving; stop the car, I want to get out". Indeed he had no opportunity of doing so as the accident happened immediately after he had warned the defendant to slow down and it is reasonable to infer that he expected the defendant to do so as he (the defendant) had done on approaching Klang. On this ground the defence that the defendant owed no duty to the plaintiff must fail.

The second line of defence is that the maxim *volenti non fit injuria* applies in this case. The learned Counsel for the defendant submitted that for this defence to succeed it is sufficient if it is proved that there was knowledge on the part of the plaintiff of the risk he was undertaking. He relied for this proposition on *London Graving Dock Co. Ltd. v. Horton*[4], where it was held that the plaintiff (respondent) being an invitee, his knowledge of the unusual risk exonerated the ship-repairers from liability for the damage sustained by him and that it was not essential to their defence to establish that he was 'volens' in that he was not under any feeling of constraint in accepting the risk. It is to be noted that in that case the defence *volenti non fit injuria* was not pleaded and the defendants relied on the plaintiff's knowledge of the danger not towards establishing the plea *volenti non fit injuria* but as an equivalent to the discharge of their duty by warning as invitors. I do not think that that case laid down that in the defence of *volenti* it is sufficient for the defendant to show that the plaintiff had knowledge of the risk. Lord Porter at p. 6 said :

"The difference between *sciens* and *volens* has by now been firmly established, but where the exact line is to be drawn is a matter of more difficulty. The accurate demarcation, however, in my opinion, need not be laid down in the present case, since it is enough to protect the invitor from liability if he proves that the invitee knew and fully appreciated the risk. The further step that he must be shown not to have been under a feeling of constraint, or, to put it otherwise, must have been *volens* is not an essential to the defence. Whether the learned judge meant to find that the respondent was *volens* I am not sure, nor am I sure that, if he had meant to do so, he had evidence which entitled him to reach that conclusion. As I have said, however, my view is that that question does not arise."

The correct view is that expressed by Bowen L.J. in *Thomas v. Quartermaine*[1], where at p. 696 he said :—

"The maxim, be it observed, is not "*scienti*" *non fit injuria*, but *volenti*. It is plain that mere knowledge may not be a conclusive defence . . . . The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of the danger . . . Knowledge is not a conclusive defence in itself. But when it is knowledge under circumstances that leave no interference open but one, namely, that the risks has been voluntarily encountered, the defence seems to me complete."

This is a question of fact; knowledge does not *ipso facto* as a matter of law import consent. It is evidence of conduct, weak or strong, according to circumstances. The relationship between the plaintiff and the defendant is a matter of considerable importance. Thus in the case of the employer — employee relationship the question is not whether the employee knew of the danger but whether in fact he agreed to run the risk in the sense that he exempted his employer from his duty not to create the danger and agreed to take the chance of an accident.

The defence of *volenti non fit injuria* failed in the case of *Dann v. Hamilton*[5] although the plaintiff there was fully aware of the intoxicated condition of the driver of the car with whom she was travelling. Asquith J., decided in the plaintiff's favour for reasons which are embodied in the following passage at p. 518 :—

"I find it difficult to believe, although I knew of no authority directly in point, that a person who voluntarily travels as a passenger in a vehicle driven by a driver who is known by the passenger to have driven negligently in the past is *volens* as to future negligent acts of such driver, even though he could have chosen some other form of transport if he had wished. Then, to take the last step, suppose that such a driver is likely to drive negligently on the material occasion, not because he is known to the plaintiff to have driven negligently in the past, but because he is known to the plaintiff to be under the influence of drink. That is the present case. Ought the result to be any different? After much debate I have come to the conclusion that it should not, and that the plaintiff, by embarking in the car, or re-entering it, with knowledge that through drink the driver had materially reduced his capacity for driving safely, did not impliedly consent to, or absolve the driver from liability for any subsequent negligence on his part whereby she might suffer harm.

There may be cases in which the drunkenness of the driver at the material time is so extreme and so glaring that to accept a lift from him is like engaging in an intrinsically and obviously dangerous occupation, intermeddling with an unexploded bomb or walking on the edge of an unfenced cliff. It is not necessary to decide whether in such a case the maxim *"volenti non fit injuria"* would apply, for in the present case I find as a fact that the driver's degree of intoxication fell short of this degree."

*Dann v. Hamilton*[5] was under consideration by the High Court of Australia in *Insurance Commissioners v. Joyce*[3]. It is clear from this case that for Australian courts a gratuitous passenger travels with an intoxicated driver at his own risk provided that he was aware, or should have been aware, of the driver's condition. It is on the comments made by the Australian High Court on *Dann v. Hamilton*[5] that the defendant relies for the proposition that the defence of *volenti* applied in this case. Briefly the argument is that the plaintiff in the present case knew that the defendant was a negligent driver and by continuing to remain in the car while it was being driven by the defendant he consented to run the risk of an accident.

It is important to bear in mind that the decision in *Dann v. Hamilton*[5] was based on a finding of fact that is that the driver's degree of intoxication fell short of the degree necessary to make the acceptance of a lift from

"like engaging in an intrinsically and obviously dangerous occupation, intermeddling with an unexploded bomb or walking on the edge of an unfenced cliff."

If there had been a finding if fact that the intoxication of the defendant was of that high degree the decision might well have been as in the Australian case.

In an article "Contributory Negligence and *Volenti non fit injuria*" 55 L.Q.R. 184 Professor Goodhart expressed the view that in *Dann's* case the plaintiff's claim could be defeated on the ground of *volenti*. He said (at p. 186):—

"In the instant case, on the other hand, the plaintiff had no right to be in the defendant's car except by his invitation. In entering the car did she not impliedly, therefore, accept the risk of which she knew? Of course, she was not *volens* in the sense that she was agreeing to be injured, but was she not *volens* in the sense of agreeing to take the risk?"

*Dann's*[5] case was recently under consideration in *Slater v. Clay Cross Co. Ltd.*[6] before the Court of Appeal where it was held that the decision in *Dann's*[5] case on the ground of *volenti* was correct.

In the present case the only evidence on which the defendant can rely consists of the fact that along the Port Swettenham — Klang Road he had been driving at a high speed to the knowledge of the defendant, the fact that the plaintiff considered that to be a dangerous speed so much so that he warned him to slow down and the fact that immediately before the accident occurred he (the defendant) was picking up speed and the plaintiff again warned him to slow down. Now, as I said earlier I do not consider that the fact that the defendant was driving at a high speed along the Port Swettenham— Klang Road is by itself evidence that the driver is a negligent driver; it may be dangerous driving as regards pedestrians but not necessarily as regards the passengers in the car; indeed the plaintiff stated that he told the defendant to slow down as he thought he was going too fast "for the safety of the public on the road". The plaintiff also stated that at this stage the defendant had good control of the car and he had known him as a good driver. I also do not consider that the evidence that the defendant was picking up speed along the Meru Road amounts to knowledge that the defendant was a careless driver; the period of time between moment at which the speed of 50 m.p.h. was gained and the time of the accident must have been a question of a few minutes, if not seconds, and it is difficult to attribute to a person previous knowledge of a negligent act when it is that act which causes the damage. But even if such knowledge could be attributed to the plaintiff there is evidence that the plaintiff told the defendant to slow down which shows that there was not on his part "a conscious and intentional assumption of the very risk for which he suffered." For these reasons the defence of *volenti* must also fail.

The third defence is contributory negligence of the plaintiff. It is established that the question of contributory negligence does not depend upon any breach of duty as between the plaintiff and the defendant. In *Nance v. British Columbia Electric Railway*[7], Lord Simon, at p. 611 said :—

"All that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

It is a question of fact in each case whether the conduct of the plaintiff amounts to contributory negligence, and in *Caswell v. Powell Duffryn Collieries*[8] it has been held that although the plaintiff must take that amount of care for his own safety which a prudent man would take in like circumstances, it is not every error of judgment or heedlessness or inadvertence which amounts to contributory negligence.

The case of *Dann v. Hamilton*[5] was fought entirely on the question whether the maxim *volenti non fit injuria* was applicable. On the facts as found Asquith J., held that it did not. In a note on "Contributory Negligence and *Volenti Non Fit Injuria*" in the Law Quarterly Review, Vol. 55 p. 184, Professor Goodhart suggests that even if the *volenti* doctrine did not apply, there was a cast iron defence on the ground of contributory negligence. The plea of contributory negligence was, however, never raised as appears from the note by Lord Asquith in the *Law Quarterly Review* Vol. 69 at p. 317; if it had been raised it would probably have been a good defence. In the above note Professor Goodhart after stating that the essence of contributory negligence is that the plaintiff was "negligent as regards himself" puts the following questions :—

> "Is not a person 'negligent as regards himself' if he entrusts his safety to a driver who is substantially under the influence of drink? Can it be said that it is not contributory negligence for a person to get into a car which he knows has defective brakes? Ought not the same rule to apply where he knows that the driver, owing to intoxication or some other cause, is similarly defective?"

Can it be said in this case that the plaintiff was "negligent as regards himself" by being or remaining in the defendant's car knowing that owing to some cause the driver, (the defendant) was defective? On the facts as I have stated them above, I do not think that he was "negligent as regards himself"; there was no failure on his part to adopt reasonable precautions or a reasonable course of action to avoid the consequences or risks which the defendant's negligence sets up; he had every reason to believe that the defendant would act sensibly.

On these grounds the defence of contributory negligence must also fail.

With regard to special damages it is not contested that the plaintiff paid $1,472 as hospital fees, incurred $174 as expenses for X-Rays, $128.35 the value of one corset-topped caliper, for a period of time he engaged a man at $100 to drive the car and also to help him in dressing and undressing and also lost income while he was disabled as a result of the accident. With regard to hospital fees counsel for the defendant submitted that there should be deducted the amount which the plaintiff would have had to spend on food in his own house and with regard to the wages of the syce these should be limited up to the time of the hearing as it is only until then that such expenses will have been crystalised in actual disbursements; any disbursements after that date will be respective and included in general damages. For this submission the learned counsel relied on *Shearman v. Folland*[9]. I agree that such deduction should be made and that the disbursements in respect of the syce should be reckoned only until judgment.

The plaintiff was in hospital for a period of three months, i.e., from the 4th September, until the 30th November, 1955. The pliantiff said that before the accident he spent about $350 a month on food. From the sum of $1,472 there should therefore be ducted the sum of $1,050 leaving a balance of $422. The syce was employed on the 20th November, 1955 and the plaintiff is, therefore, entitled to wages for eight months, i.e., $800.

With regard to loss of income the plaintiff was completely disabled from the date of the accident, until he resumed work, not with his previous employers but with the Sun Life Insurance Company of Canada. In view of the nature of the plaintiff's work and terms of employment it is difficult, if not impossible, to assess an exact figure as to his monthly income but after examining the figures submitted in evidence I consider that $800 a month is a fair estimate, and on this head I allow the plaintiff $6,000, i.e. for a period of seven and one half months. The learned counsel for the defendant, however, submitted that the principle of *restitutio in integrum* required that the plaintiff should be put in the position in which he would have been but for that accident and that the sum ultimately arrived at should reflect the fact that it is not subject to income tax, whereas the income he would have received from his employment would be subject to income tax; the learned counsel therefore submitted that any figure arrived at as being loss of earnings should be reduced by the amount he would have had to pay by way of income tax. He referred to *British Transport Commission v. Gourley*[10] overruling *Billingham v. Hughes*[11] Counsel for the plaintiff did not contest this point of law and I agree that a deduction for income tax should be made.

With regard to general damages, the plaintiff sustained a severe injury to the lower end of the left femur; he had also crack fracture of the 4th, 5th and 6th ribs on the right side; there was considerable pain and suffering; as a result there are the following permanent disabilities : (a) shortening of the leg by 2½ inches, (b) the degree of the movement of the knee is limited to 90 degrees while the normal range is 150 degrees — (according to medical evidence the degree of movement may improve slightly over 90, (c) occasional pains in the back. These disabilities will limit the more energetic types of activities; thus the plaintiff who used to play games before the accident is now limited to such exercise as swimming and dancing. Such disabilities will also naturally prevent him from carrying on his duties as energetically as he did before the accident and do, in my opinion, amount to some loss of earning capacity. He was 39 years old on the date of the accident.

The question of assessment of damages in cases of personal injuries is not an easy matter; it has often been stated that there can be no fixed and unalterable standard; but as Birkett L.J. in *Bird v. Cocking & Sons Ltd.*[12] said :—

"The Courts have been making these assessments over many years, and I think that they do form some guide to the kind of figure which is appropriate to the facts of any particular case . . . . The only thing that can be done is to show how other cases may be a guide, and when, therefore, a particular matter comes for review one of the questions is, how does this accord with the general run of assessments made over the years in comparable cases?"

Having considered various cases where damages were awarded for similar personal injuries and taking into consideration the permanent disabilities above referred to and the consequences thereof and the loss of amenities and the pain and suffering the plaintiff underwent, I assess general damages at $35,000.

There shall therefore, be judgment for the plaintiff in the sum of $42,174.35 made up as follows :—

| | |
|---|---|
| General damages ... ... ... | $35,000.00 |
| X-Ray Expenses ... ... ... | 174.00 |
| Cost of caliper ... ... ... | 128.35 |
| Hospital expenses, less food ... | 442.00 |
| Syce's wages ... ... ... ... | 800.00 |
| Loss of earnings $6,000 (less income tax $35) ... | 5,650.00 |
| | $42,174.35; |

and costs.

COURT OF APPEAL.

*M. M. Shanker* for the appellant (defendant).

*S. T. Chung* for the respondent (plaintiff).

**Thomson C.J.** (delivering oral judgment) : — This is an appeal from a decision of Mr. Justice Buhagiar in which he awarded the respondent some $42,000 damages in respect of injuries which he suffered arising from the negligent driving of a motor vehicle by the present appellant.

As regards the question of liability, there is no appeal. Neither is there any appeal regarding so much of the damages, amounting to some $7,000, as consists in special damages. What is complained of by the appellant is the award of $35,000 by way of general damages.

Before proceeding further, I would pause and, for myself, congratulate Counsel for the appellant on the thoroughness and tenacity with which he urged upon us everything that could possibly be said for his client. It is a matter of regret, so far as I am concerned, that his conduct of the case should not meet with at least some reward. Nevertheless, I am forced to say that for myself I would dismiss the appeal. In that connection I have reminded myself of the observations of Lord Justice Greer in the case of *Flint v. Lovell*[13].

". . . . I think it right to say that this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum."

I have also reminded myself of the relevant portion of the speech of Lord Wright in the case of *Davies v. Powell Duffryn Associated Collieries Ltd.*[14].

Here I will make two observations. One is that so far as concerns such questions as pain and suffering and what the learned Judge in this case called loss of amenities, any assessment of damages must contain a very large subjective element. A very large part in the assessment must be played by the personal opinion of the trial Judge. It would be difficult, I think, to put one's finger on any authority in terms for that proposition, but it springs from the general principle that essentially the assessment of damages is a jury question. The second thing I would say is that I can find no authority to support the proposition (and personally, as long as I am free to do so I shall set my foot against any attempt to lay down any such rule) that the assessment of damages in personal injury cases must in every case result from the application of some sort of formula, that we must measure the shortening of the leg by the inch, that we must ascertain to the nearest inch the point at which the leg has been amputated, and that we should thereby arrive at some figure which we can use to perform some arithmetical operation or to arrive at some absolute notional standard of damages.

I am not overlooking anything that was said in the case of *Rushton v. National Coal Board*[15], but I do not think that case goes any further than to say that a Judge when sitting alone must, when assessing damages, pay some sort of regard to the general run of damages, and that if he gives something which is manifestly a departure from the general run of assessments, then the figure at which he arrives will invite rather more attention from the Court of Appeal than would otherwise be the case.

In the present case I have read with great care the learned trial Judge's judgment in which he discusses the principles he has applied in the present case. I I have also applied my mind to the English assessments of damages to which our attention has been invited. And I must say that I cannot find any such departure from settled principles in what is stated by the learned Judge nor, making allowances for differences in conditions between this country and England, such disparity or divergence from the figures that have been quoted as would justify this Court in saying that the learned Judge was so wrong that this Court would be justified in interfering. I am not saying for one moment that if I had been trying the case I should have awarded the same amount of damages. What I am saying is that, applying the law as I understand it, I do not feel justified in saying that this Court should interfere with the conclusions at which the learned Judge arrived.

I would, therefore, dismiss the appeal with costs and would order any deposit that may have been made to be dealt with in the usual way.

**Abdul Hamid J.** and **Neal J.** concurred.

*Appeal dismissed.*

Solicitors: *Shearn, Delamore & Co.; Braddell & Ramani.*

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## A. GABRIEL & ANOR. v. PUBLIC PROSECUTOR

[A. Cr. J. (Shepherd J.) February 4, 1957]

[J. B. — Criminal Appeal No. 42 of 1956]

*Criminal Trial — Duty of prosecution to produce witnesses — Accused's explanation consistent with innocence.*

The only duty which rests upon the prosecution is to produce, or to agree to produce, if they can, witnesses from whom they have taken statements and who are in a position to give material evidence upon issues about to be tried. The prosecution are not bound to put such witnesses into the witness box, but they have to make them available to the defence.

If a reasonable explanation is given by an accused which is consistent with innocence and which is of such a nature that it leaves the Court in doubt as to whether the accused is innocent or guilty, then the benefit of that doubt must be given to the accused.

*Cases referred to:—*

(1) *R. v. Bryant & Dickson* 31 Cr. App. R. 146.

(2) *R. v. Beecham* (1921) 3 K.B. 464.

MAGISTRATE'S CRIMINAL APPEAL.

*R. Murugason* for the appellant.

*Bahaudin* (Federal Counsel) for the respondent.

**Shepherd J.** : — This was an appeal by the two appellants against conviction upon the following charges laid against them respectively :—

"That you at about 11 p.m. on 25-7-56 at the Customs Inward Gate, Johore Bahru, being a passenger in a Green Bus from Singapore after having denied that you had any dutiable goods were found to have upon your person dutiable goods, to wit 1 pair of gold bangles, 2 gold chains, 16 pairs of gold attachments to the ear-ring, 3 gold rings and 2 pairs of gold pendants and that you did thereby commit an offence contrary to section 131(i)(f) and punishable under section 131(1)(i) of Customs Ordinance No. 42 of 1952."

"That you (Thangavelloo s/o Rengasamy) at about 11 p.m. on 25-7-56 at the Customs Inward Gate, Johore Bahru, were concerned in importing uncustomed goods to wit 1 pair of gold bangles, 2 gold chains, 16 pairs of gold attachments to the ear-ring, 3 gold rings and 2 pairs of gold pendants and that you did thereby commit an offence contrary to section 131(1)(a) and punishable under section 131(1)(i) of the Customs Ordinance No. 42 of 1952."

There was a joint trial and a joint petition of appeal from the decision of the learned President of the Sessions Court, Johore Bahru. The petition was in the following terms :—

"(a) the prosecution had not proved its case beyond all reasonable doubt in that,

(i) it had not called all material witnesses concerned in the case.

(ii) that there were discrepancies in the evidence (here particulars of alleged discrepancies were set out).

(b) the learned President of the Sessions Court erred in law when he formed the opinion that it is for the appellants to call the Malay R.O. who was in charge of the machine in the revenue collection room.

(c) the appellants have given a reasonable explanation and their evidence was supported by D.W. 3 who is an independent eye witness whereby the appellants should be given the benefit of the doubt.

(d) that the verdict of the learned President of the Sessions Court should be set aside on the ground that it was unreasonable or could not be supported having regard to the evidence."

With regard to the first ground of appeal, namely, that the prosecution had not called all material witnesses, it was urged by learned counsel for the appellants that it was the plain duty of the prosecution to call the Revenue Officer who was a witness to some of the events which took place in the revenue collection room. Shortly, the Revenue Officer was alleged by the defence to have been in a position to corroborate the defence on the issue as to whether or not the second appellant (the gold-smith) was ready and willing to pay the duty payable on the articles which, both appellants said, they had freely admitted having brought into the Federation of Malaya.

It was urged that this witness may have been able to give evidence on this particular point. According to the prosecution evidence (it may be inferred), he closed his collecting machine and left the room when it became apparent that the appellants had been caught red-handed in an attempt to smuggle dutiable articles into the Federation. The appellants not having more than $5 between them, it was quite obvious that nothing would be received by way of duty.

The defence urged that he left for quite another reason, namely, that he was told not to accept any duty, presumably because the Revenue Officer wanted to conjure up a case against the appellants in order to secure a reward. They had the money but he (the man at the machine) was not prepared to accept it: that was their case.

The only duty which rests upon the prosecution is to produce, or to agree to produce, if they can, witnesses from whom they have taken statements and who are in a position to give material evidence upon issues about to be tried. The prosecution are not bound to put such witnesses into the witness box, but they have a duty to make them available to the defence. It is stated by the learned Editor of *Woodroffe & Ameer Ali's* Law of Evidence (9th edition) at p. 721 that :—